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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JAMES PLYLER AND STATE OF TEXAS, ET AL.,
APPELLANTS
V.
J. AND R. DOE, ET AL., APPELLEES
IN RE ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
APPELLANTS
V.
CERTAIN NAMED AND UNNAMED UNDOCUMENTED
ALIEN CHILDREN AND UNITED STATES, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

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OCTOBER TERM, 1980

JAMES PLYLER and STATE OF TEXAS, et al.,
Appellants

V.

J. and R. DOE, as guardian ad litem for I. DOE, et al.,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

V.

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN, et al,
Appellees.

BRIEF OF LEGAL FOUNDATION OF AMERICA AS AMICUS CURIAE

CONSENT OF PARTIES

All parties have consented to the filing of this Amicus Curiae brief, and copies of letters of consent have been lodged with the Court.

INTEREST OF AMICUS CURIAE

Legal Foundation of America ("LFA") is a nonprofit corporation operating as a public interest law firm. Among its objectives are the protection of a federal system in which the national and State governments each defer to the other's appropriate role and the preservation of viable public schools. LFA does not accept private fees. All litigation undertaken by it is approved by its Board of Trustees, the majority of whom are attorneys. LFA participated below as amicus curiae with leave of the Court of Appeals.

In this case, LFA urges reversal of the decision of the Fifth Circuit. As the

District Court in Alien Children pointed out, there is reason to question whether the cumulative weight of judicial intervention in public schools is beneficial. Furthermore, notwithstanding the emotional pull of the Plaintiffs' arguments, LFA believes that the statute in question represents a valid legislative attempt to deal with the intractable problem of the illegal immigrant.

STATEMENT OF THE CASE

The lower courts enjoined Texas from enforcing a statute denying State funds for the free public education of certain illegal entrants. The statute was passed comparatively recently, based upon a bill authored by a Mexican-American legislator, by a large majority of legislators concerned about increasing waves of illegal immigration. The Court of Appeals refused to find that Texas was thereby expressing even a rational interest in avoiding

encouragement of illegal entry, avoiding complicity in the federal offense of harboring, or preserving public education for bona fide residents. That Court also failed to consider the effect of the Texas Education Agency (TEA) guidelines interpreting the statute. This holding means that entrants whose presence is a violation of federal criminal law, and who have made no effort even to apply for lawful admittance, have the same right to attend free schools as citizens or legally admitted aliens.

SUMMARY OF ARGUMENT

I.

This case was decided below on a wholly erroneous legal theory. Section 21.031 does not prevent even illegal immigrants from attending school free, if they comply with Texas Education Agency guidelines and have a bona fide relationship to the State of Texas. Under the authority of Vlandis v. Kline, 412 U.S. 508 (1973),

conditioning free education on these requirements is constitutional.

II.

Section 21.031 serves important state interests. Provision of free public education to illegal entrants would place State officials in literal violation of the federal criminal law. In addition, free public education is a pull factor increasing the volume of illegal immigration. Increases in ethnic concentration from illegal immigration will impact most harshly upon Texas' poorest citizens and will frustrate the goal of educating the electorate. Illegal immigration also adversely affects bilingual education.

III.

The equal protection clause applies only to persons "within [the] jurisdiction" of a State. This phrase should not be construed in terms of mere physical presence or absence. Rather, the term "within

the jurisdiction" implies a lawful relationship of correlative obligation and authority.

IV.

Even if the equal protection clause should be considered applicable, it should not require a compelling State interest in this case. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), holds that education is not a fundamental right; it also indicates by its reasoning that "access" to education is not a fundamental right.

The statute in question does not amount to unconstitutional wealth discrimination or discrimination against children for acts of their parents.

ARGUMENT AND AUTHORITIES

I. THE STATUTE AT ISSUE MERELY CONDITIONS FREE PUBLIC EDUCATION ON REASONABLE, CONSTITUTIONAL REQUIREMENTS OF BONA FIDE RESIDENCE AND RELATION TO THE STATE.

To understand the effect of Section 21.031, one must examine the regulations promulgated by the Texas Education Agency (TEA) defining "legally admitted" aliens. Texas Education Agency, Rule 226.13.90, 5 Tex. Reg. 521 (1980). (The guidelines are reproduced as Appendix "A"). A review of those guidelines reveals that the lower courts erred in assuming that technically unlawful presence under federal law prevented free education. Many aliens who have not yet qualified for truly "legal" status under federal law are nevertheless eligible to enroll in school under state law. For example, a mere application for lawful admission is sufficient, as are more than a dozen other acts or documents. Anyone with a substantial relationship to Texas, evidenced by compliance with the TEA guidelines, is allowed to attend its schools.

Thus, the distinction is not merely

between "legal" or "illegal" presence. The regulation also reflects a distinction between those who have demonstrated a bona fide relationship to Texas and those who have not. Those who are "legally admitted" aliens, as defined by the TEA guidelines, have demonstrated, through registration with or application to the Immigration and Naturalization Service (INS), that they are not merely transients, but do intend to reside within and remain in the State of Texas.

Unquestionably, a state may limit benefits to those who are bona fide residents. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), affirmed, 410 U.S. 985 (1971). In Vlandis, the Court "fully recognize[d] that a State has a legitimate interest in protecting and preserving the quality of

its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis." 412 U.S. at 452, 453. While the Court struck down a Connecticut statute creating a permanent irrebuttable presumption of non-residence for in-state tuition, it recognized that the state could make the issue turn upon bona fide residence. The instant case falls within the Vlandis reasoning.

The situation here is also like the situation in Starns v. Malkerson, supra. In Starns, the University of Minnesota promulgated a rule which provided that no student would be accorded in-state residence status for tuition purposes unless the student had been a "bona fide domiciliary" of Minnesota for at least one year. In upholding the regulation, the district court noted that the rule presumed that one was not a permanent resident if one

came to Minnesota to go to the University and had not lived in Minnesota for at least one year. The Court went on to explain:

> This presumption can be overcome if the student provides sufficient evidence to show bona fide domicilliary [sic] within the State, one element of which is proof that he has resided within the State for a period of one year. Thus, there is no arbitrary or permanent classification of the type found to constitute individious discrimination in Carrington v. Rash...[380 U.S. 89 (1965)]. We believe it is reasonable to presume that a person who has not resided within the State for a year is a nonresident student and that it is reasonable to require that to rebut this presumption the student must be a bona fide domicilliary of the State for one year. 326 F.Supp. at 240.

This Supreme Court also so held through its summary affirmance. 410 U.S. 985 (1971). Here, Texas has done nothing more than the University of Minnesota; indeed, by accepting a mere application as sufficient, it has done less.

This Court has often upheld durational residence requirements for newcomers to receive government benefits. Sosna v. Iowa, 419 U.S. 393 (1975); Vlandis v. Kline, supra; Starns v. Malkerson, supra. Cf. Weinberger v. Salfi, 422 U.S. 749 (1975) (upholding a durational marriage requirement for certain Social Security benefits). See generally, Elkins v. Moreno, 435 U.S. 647 (1978) (discussion of the allocation of state benefits to those who are domiciliaries). While the Texas statute at issue is not a durational residence requirement, its purpose is identical: to create an objective measure of bona fide relationship to the State. As the Court stated in Weinberger v. Salfi, supra, 422 U.S. at 772:

> As in Starns v. Malkerson, 326 F.Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed. 2d 527 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a

> sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in Starns, appellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test. (emphasis added).

Viewed thus, the requirement of an attempt to comply with TEA guidelines by a mere application for lawful status is no more onerous than many other clearly lawful requirements to attend school. One must also, for example, demonstrate that one is at least five years of age. One must furnish evidence of immunization against a variety of diseases. None of these requirements violates the fourteenth amendment. Here, those aliens who have made an effort to apply to the INS have established a more stable and permanent relationship with the State of Texas than have those who make no such effort.

II. THE STATUTE AT ISSUE SERVES SUFFICIENTLY IMPORTANT STATE INTERESTS TO COMPLY WITH EITHER THE "ARTICULABLE RATIONAL BASIS" TEST OR THE "COMPELLING STATE INTEREST" TEST.

While the statute at issue will withstand both the strict scrutiny and rational basis tests, this Court should utilize the rational basis test if the equal protection clause is applicable at all. This test has been stated as follows:

> . . . the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 425, 426, (1961) [emphasis added]; [citations omitted].

The statute here has many justifications.

A. The statute serves important criminal justice interests by allowing Texas to avoid complicity in the commission of a federal crime.

(1) The orders of the courts below require Texas officials to commit the crime of harboring.

Federal law prohibits the immigration or entry of a person having no authority to enter the United States. 8 U.S.C. §1325 (1964) (misdemeanor offense for first detected entry); 8 U.S.C. §1326 (1964) (felony offense for entry by a person previously deported). Much has been made in this case of the fact that some children enter without knowing and most enter with their parents. However, 8 U.S.C. §1101(a) (1964) defines illegal entry as including any "coming into the United States whether voluntary or otherwise" (emphasis added). As both District Courts stated in this case, the illegal entry statutes "do not distinguish between

children and adults," and "the undocumented minor children are, of course, legally culpable." Furthermore, harboring of a minor is as much a crime as harboring of an adult.

A State officer who knowingly furnishes shelter to an illegal entrant, adult or child, is squarely engaged in conduct prohibited by the Congressional definition of harboring. 8 U.S.C. §1324(a) (1964 & Supp. 1980). This statute makes it unlawful to facilitate either entry or continued presence by a variety of acts. "Harboring" is not limited to clandestine sheltering; it includes acts that are done openly. United States v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976) (furnishing of living quarters held harboring). The offense need not be related at all to the actual entry. It can consist in furnishing shelter long after the entrant is within the territorial jurisdiction. United

States v. Cantu, 557 F.2d 1173 (5th Cir. 1977), cert denied, 434 U.S. 1063, (1978). The statute is designed to be "broadly inclusive" rather than restrictive, and the courts of appeals have emphasized that it reaches harboring committed "in any place." United States v. Cantu, supra (harboring outside, in open air); See also, United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976) (acts committed outside the country are included, owing to broad interpretation of "in any place"). A "broad" construction of "in any place" presumably includes a building, such as a school building. The statute excepts employment from its terms, but that is the only exception it provides, and, in particular, there is no exemption for State government officials. Under these authorities, officers who knowingly enroll illegal entrants are squarely engaged in the offense of harboring.

(2) Texas has an important interest in avoiding even de facto participation in criminal violations.

It is unlikely that anyone would ever be sucessfully prosecuted under this theory because the approach of the Justice Department to this case ensures nonprosecution. But one need not find a prosecutable violation to argue that a State should refrain from de facto complicity in illegal activity as a matter of policy. The demoralizing effect of State participation in illegality has had predictable results here. The Alien Children District Court's own opinion states that "all know [the immigration quota] will be effectively disregarded . . . . Those who promote lawlessness by ignoring the laws are held largely blameless." In Re Alien Children Litigation, 501 F.Supp. 544, 549 (S.D. Tex. 1980). This situation is the natural consequence of government connivance in

violation of the law. It is aggravated by the knowledge of every Texas schoolchild that the circumstances the District Court criticized exist in the schools themselves, carried out by State officers on the District Court's own order.

The effect of government participation in lawbreaking was addressed early in the famous dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928). From that case and others came the exclusionary rule applied in criminal cases. The exclusionary rule reaches much government conduct that is neither intended nor morally culpable. It has devastating costs, most of which are borne by the arbitrarily defined class of future crime victims. Nevertheless, the exclusionary rule stands as a bastion to the principle that a State not only may, but must, avoid even de facto participation in illegal activity. Texas should not be

prevented from following the same principle as to harboring violations in this case.

(3) An anti-employment law would not address the problem of State complicity in crime by harboring.

The Fifth Circuit strongly suggested that it would prefer a law punishing private employers to the law in question in this case. Such a law would not address the fundamental issue addressed here. Private employment does not involve active state complicity in violation of law, but the State's offering of free school enrollment as required in this case does involve active de facto state complicity in a federal crime. Texas has a compelling interest at least as great as that underlying the exclusionary rule in avoiding de facto criminal complicity, and therefore in upholding Section 21.031, for these reasons.

(4) A federally imposed requirement that State officers commit crimes is an impermissible encroachment upon State sovereignty.

In National League of Cities v. Usery, 426 U.S. 833 (1976), this Court held that the federal government could not force State employers to comply with wage-and-hours laws. To do so would have been an impermissible encroachment upon State sovereignty protected by the tenth amendment and the federal system. The national government, Usery says, "may not exercise power in a fashion that impairs the integrity of the States." 426 U.S. at 842-43 (emphasis added). But if these concepts are violated by a Federal wage-and-hours law, they must be even more infringed by a federal court order requiring State employees to commit criminal acts in the State's own educational system, which should teach respect for criminal laws.

B. The statute serves the important purpose of limiting State-created inducements to illegal immigration.

(1) The District Court erred in characterizing Texas' efforts to avoid encouragement of illegal immigration as impermissible.

The District Court's holding in Alien Children was that because "Measures to decrease immigration, whether legal or illegal, are the province of the federal government," a State may not "limit the inducements to" illegal immigration created by it. Aliens, supra, 501 F.Supp. at 578. There is no authority for this proposition. To the contrary, there is much authority upholding State efforts to avoid giving inducements to violation of federal policy. See De Canas v. Bica, 424 U.S. 351 (1976).

To hold that the States may not permissibly act to ensure that their own laws do not encourage the commission of federal law violations would lead to unaccountable results. For example, if a

Houston police officer observes the robbery of a federally insured bank, he should logically be permitted to apprehend the perpetrator. It would make no sense to hold that the deterrence of bank robberies by State conduct was "impermissible" merely because the federal government has acted to make them illegal. Cf. Dandridge v. Williams, 397 U.S. 471 (1970) (State does not contravene federal law by enacting decreases in aid designed in part to remove inducement to childbearing).

The argument is not denigrated by the principle that regulation of immigration is the exclusive province of the federal government. The statute in question is an enactment touching a matter of intense local concern, that of education, and is simply not a "regulation of immigration." See, DeCanas v. Bica, supra. Secondly and more importantly, it would make no sense to say that a State cannot order its local

laws so as to have beneficial effects on federal policy. For example, the City of Houston has constructed and operates an Intercontinental Airport. The federal government, however, is given the power to regulate interstate and foreign commerce (including air travel) by the Constitution, just as it is immigration. The District Court's reasoning would lead to the result that the airport would be an "impermissible" purpose for the City.

(2) The lower courts' holding that free education would provide no additional inducement to illegal entry was error.

The Alien Children District Court concluded, further, that even Texas' "impermissible" purpose would not be advanced by the legislation at issue. The Fifth Circuit implied the same by finding absence of a rational purpose. In this connection, it is conceded by all concerned that Section 21.031 will not stop

illegal immigration altogether. As the parties stipulated, a "major pull factor" for illegal immigrants is work. But work is just as obviously not the only such factor, and the courts below erred in treating it as though it were.

Motivation is made up of a calculus of all perceived benefits and perceived costs. For a given salary level, people might be willing to do some kinds of work and unwilling to do others. Fringe benefits, working conditions, and any disadvantages, danger or stigma are factors. The plight of metropolitan schools provides irrefutable proof that parents have been eager to migrate in response to the major "pull factor" of perceived quality of education. Cf. L. Graglia, Disaster by Decree: The Supreme Court's Decisions on Race and the Schools (1976).

In the case at bar, the lower courts had before them evidence that relatively

few adults who immigrate unlawfully today bring children. Those courts failed, however, to take into account the certainty that their decrees would increase the percentage who do so in the future and thus increase the level of unlawful entry. Furthermore, The Preliminary Report of the Domestic Council on Illegal Aliens (1976) identified education as a significant inducement to illegal entry. The Domestic Council described the causes as "an international push-pull." Id at 40. Employment is the main pull factor, but "social and demographic factors such as educational facilities . . . are involved." Id. Employment as a motivation "is enhanced by better opportunity for schooling and education for [aliens] and their children." Id. at 42 (emphasis added). The Domestic Council recommended the removal of secondary pull factors such as "various benefits." Id. at 110.

Experts are unable to measure precisely the inducement provided by education. But legislative judgments of the effect of an inducement or deterrent upon future human behavior must necessarily be sustained upon much less than proof of actual effects, because such proof is unattainable. Judgments of the sort have been upheld even when rewards or deterrents were severe, when they operated in sensitive Consitutional areas, and when they affected children.*

Many problems have no simple legislative "solutions." A given problem may

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* See, e.g., Danridge v. Williams, supra (subsistence to children can be reduced to prevent unquantifiable inducement to childbearing although not the only or even the "major" inducement); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) (severe increase in criminal penalty for deterrence purposes justifiable even though quantum, or even existence, of deterrence effect not provable and found only though deference to legislative judgment).

have several "causes." Often, too, it happens that a particular cause, even though the "major" cause, is more difficult to control by law than other causes. Dandridge v. Williams, supra, squarely holds that a court cannot require a legislature to adopt the balancing of competing social concerns that the court thinks "best," based on the limited sort of evidentiary predicate of a judicial proceeding.

(3) The lower Court's decision makes it unlikely that any workable plan for the control of inducements to illegal immigration can be confidently enacted.

The lower court opinions fail to describe directly any remedy against unlawful immigration that might be acceptable, but they hint at the enactment of criminal laws punishing employers as a potential measure. It is submitted, however, that those courts' own reasoning

would render unlikely the prospect that such a law could stand. The Alien Children District Court, for example, held that access to education is a fundamental right to which undocumented aliens are entitled. The right of access to employment is far more clearly a candidate to be treated as a fundamental right. Thus in Truax v. Raich, 239 U.S. 33 (1915), this Court stated:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure.

239 U.S. at 41. By this rationale, a law against the employment of an illegal entrant could not stand.

There would be further consitutional difficulties with a law respecting employment of illegal entrants if the reasoning of the Courts below were adopted. For example, such a law seems less likely than

this Texas law to qualify as the "least onerous alternative." It would drive resident illegal entrants underground and subject them to more of the kind of exploitation that the courts below rightly deplored. Furthermore, the plaintiffs have attacked the law here in question as ethnically motivated, and thus involving a suspect class; that argument could be more persuasively advanced in the case of an anti-employment law. Employers would likely refuse to hire legally present Hispanics in case of doubt about the legality of their status. One of the nation's most respected investigative agencies, the General Accounting Office (GAO), has concluded that an anti-employment law would be unworkable unless accompanied by a national identification card system. The GAO stated that such a card system would be "drastic" and predicted its political non-acceptance.

Houston Chronicle, December 2, 1980, Sec. 1, p. 1, col. 1.

An anti-employment law would also run afoul of the District Courts' reasoning that a law impacting upon children is constitutionally infirm. Such a law would mean that alien children residing in the United States would receive no support, since their parents could not work. It would also mean that after they had received the education ordered by the courts below, they could not be employed in the United States, on account of acts of their parents committed when they were children. This unreasonable result -- that a person would be entitled to a court-ordered free public education but an employer would commit a crime by offering him a job after he had obtained that education -- is the product of the lower courts' reasoning.

A law sanctioning employers of illegal entrants would also suffer from practical

deficiencies. To avoid penalizing employers who acted in good faith, such a law would require the imposition of a high mens rea standard (e.g., specific intent), which would make successful prosecution impractical. The law would also be widely ignored. It would create disrespect both in those sporadic instances when it would be enforced and when violations would go unpunished. In states such as California that have anti-employment laws of the sort the lower courts suggested they preferred, non-enforcement has reached nearly comical proportions. California Rural Legal Assistance (CRLA) recently sued on behalf of twelve discharged illegal aliens, winning them reinstatement and back pay of $33,000.00. CRLA, a government entity, stated that the illegality of the employment (and, for that matter, of the court-ordered reinstatement) made "no distinction." Houston Chronicle, December 17,

1980, Sec. 1, p. 9, col. 2.

The Texas law here in question is vastly different. It does not impact adversely upon citizens or lawfully admitted aliens, has produced no difficulty in enforcement, and does not require criminal sanctions for its implementation. Amicus curiae does not take the position here that a law sanctioning employers would in fact be unconstitutional, but amicus does argue that an anti-employment law, even though suggested by the lower courts, is inconsistent with those courts' own reasoning, and that it is not at all clear that the Texas law here in question is less humane or less likely to accomplish its purposes.*

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*The District Courts mentioned another possible sanction: that of reporting illegal entrants who register in school to immigration authorities. However, the exercise of a fundamental right associated with the first amendment cannot be deterred by State intrusions into associational privacy. A mass of cases, beginning with

Judge Reavley of the Fifth Circuit, in his concurring opinion in Boe v. Wright, 648 F.2d 432, 439 (5th Cir. 1981), agrees that it is not illogical to enact Section 21.031 rather than an anti-employment law:

> I suggest that the Texas Legislature could have concluded that it was more important to eliminate the incentive to illegal immigration in the form of the state and locally funded bounty of free public education, as opposed to the incentive of employment, which is for the most part in the private sector, since the policy of affording free public education to illegal aliens would be contrary to and in conflict with national education policy as established by Congress. Can it be denied that free education is an incentive to move across the Rio Grande?

The Alien Children District Court's reasoning, however, is not only based upon

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(Con't)
NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 (1958), so holds. If the District Court's reasoning is accepted, "turning in" those who exercise this fundamental right would be unconstitutional. The conflict between this result and the federal immigration authority is obvious -- and irrational.

this proposed "solution" (an anti-employment law); instead, it is based on the assumption that there is likely in the future to be an official amnesty of undocumented aliens. Aliens, supra, 501 F.Supp. at 558, 559. Such reasoning must result in the inevitability of amnesty, the encouragement of illegal entry in the present, and the need for a further amnesty, two or three years after the first one, to absolve those who have been encouraged by it. The District Court alternatively viewed the situation as one of "de facto" amnesty, because many aliens have eluded efforts to apprehend and deport them. However, the government in fact deports thousands of illegal entrants annually. Furthermore, the District Court's reasoning would impliedly grant amnesty as to dozens of kinds of violations as to which the ratio of enforcement actions to actual infractions is much smaller (e.g., gambling

or possession of various contraband).* The error in the District Court's reasoning is that of viewing the illegal presence as "due to" the "inaction" of the government. The illegal presence is rather due to the affirmative act of those illegally present, and it should not be rewarded by extensions of rights simply because the government's effort is overwhelmed by those who have eluded it.

(4) The Texas Law is consistent with immigration policies regarding refugees.

Federal law authorizes 270,000 ordinary immigrants per year, in addition to

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*Cf. e.g., International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945) (upholding jurisdiction of defendant outside territory on ground that "privileges" of conducting business give rise to reciprocal "obligation" to respond to suit); Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339 (1940) (reciprocal relationship of lawful domicile is sufficient for jurisdiction without regard to presence, and "the authority of a state over one of its citizens is not terminated by the mere fact of his absence").

50,000 refugees. (For 1981, the refugee number has been increased to 217,000, of whom 168,000 will be from Indochina alone.) Over and above these numbers, an estimated 763,000 Cubans and Haitans were admitted in 1980. Commentary, Feb. 1981, at 55. "Asylum" remains another, separate category, for which there is no numerical limit. This lawful immigration is part of a great tradition. The United States has always held out a hand to the tired and the persecuted, and it is still doing so today.

However, Cubans are placed in armed camps surrounded by barbed wire. Haitians are "interdicted" in leaky boats and deported unless they can produce evidence that they are politically persecuted. To the embarrassment of the United States, Canada has asked that immigrants from El Salvador be deported to it rather than to the fear of death at home. In short,

criminally illegal immigration by those whose need is not as great is elbowing out the ability of this nation to absorb genuine refugees, including politically persecuted peoples. Further incentives to illegal immigrants would simply punish those who need asylum the most. Texas has an interest in ensuring that its laws do not frustrate the policy of the United States, and that purpose supports section 21.031.

C. The Statute at issue serves important interests in preserving the Texas Public School system.

(1) The State has an interest in preserving the schools of Texas, especially for those who are most dependent on those schools.

The patterns of concentration of illegal aliens in selection of housing are certain to increase the dilution of educational services for certain groups in border and urban Texas. The border school

districts, many of which have low tax bases, will strain to properly house the additional students. The urban districts will have problems accomodating the illegal alien students with respect to housing, programming and scheduling. These problems, however, will not be confined to the illegal alien student. Rather, those presently attending school will feel these problems in the form of overcrowding and dilution of the quality of education offered.

The impact will not be uniform. The people harmed by the lower courts' judgment will not be the wealthy, they will not be those who can afford to go to private schools, and they will not be those for whom the advantages of America have always been available. The impact will be on the poor, on the disadvanted, and on Mexican-American students who are citizens or legally admitted aliens. Protection and

preservation of the State's resources which are designated to provide those who most rely on public education for the chance to improve their lives is at the heart of the State's interest in free public education. It would be difficult to articulate or imagine a more compelling state interest.

(2) Texas has an interest in educating its electorate to perpetuate the democracy.

In a democracy, one of the most important functions of education is to perpetuate the democracy through an informed electorate. As Judge Reavley concluded, "Texas' interest in educating the electorate is clearly frustrated in this case." Boe v. Wright, supra, 648 F.2d at 437. The concurrence of Chief Judge Clark and Judge Reavley in Boe indicates that had Doe v. Plyler, 628 F.2d 448 (5th Cir. 1981), originally been decided by their panel of the Fifth Circuit,

the opposite result would have been reached. Doe v. Plyler, supra, does not address the need for an educated electorate. It fails to recognize that this need would not be served by its suggestion of an anti-employment law.

As Judge Reavley stated, the Texas legislature:

> could reasonably have concluded that it should not dilute its limited resources [for educating the electorate] by providing free public education to illegal aliens who can never--absent some form of amnesty--become citizens, exercise the franchise, or serve in the armed forces of the United States.

648 F.2d at 436. Furthermore, the legislature could have concluded that it was undesirable for the electorate to become segregated on de facto wealth grounds, as it would be when the "dilution" caused financially able parents to choose private schools. The State's interest is made even more poignant by TEA regulations, which mean that the illegal immigrants for

whom the electorate was thus sacrificed in Doe v. Plyler, supra, are those who have not bothered even to apply for the right to stay.

(3) The holding below failed to account for probable future events, including the fact that illegal immigration comes in unpredictable waves and the probability of adverse parental reaction to loss of autonomy.

One major error in the lower courts' analysis, it is submitted, is their failure to take account of the future. A child two years of age in Texas today will be out of the public education system in twenty years. The lower courts did not assess the cumulative effect of federal decisions over this period. The rate of illegal immigration is not steady; it is rising rapidly, and history indicates that it comes in unpredictable waves. There is no reason to believe that judicial extension of social benefits and outright

prediction of amnesty will not provoke new and more significant such waves five or ten years from now. These orders, cast in the concrete of a constitutional holding, would prevent legislative response to such a situation.

Without deference to legislative judgment about such matters, parents' views of the increasing regulation of public schools by decisions such as these, together with a declining tax base per pupil, may, by the device of the self-fulfilling prophecy, undermine public education altogether in border and urban Texas. Justice Powell expressed these ideas in Columbus Board of Education v. Penick, 443 U.S. 449(1980) and in Dayton Board of Education v. Brinkman, 443 U.S. 526 (1980) (dissenting opinion), as follows:

> The orders affirmed today typify intrusions on local and professional authorities that affect adversely the quality of education. . . . This wholesale substitution of judicial

legislation for the judgments of elected officials and professional educators . . . constitutes a serious interference with the private decisions of parents as to how their children will be educated. . . .

These harmful consequences, moreover, in all likelihood will provoke responses that will defeat the . . . purpose of the court's order. Parents, unlike school officials, are not bound by these decrees and may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence.

. . . It would be unfair and misleading to attribute this phenomenon to a racist response to integration per se. It is at least as likely that the exodus is in substantial part a natural reaction to the displacement of professional and local control that occurs when courts go into the business of restructuring and operating school systems. 99 S.Ct. at 2990.

(4) The District Court's decision will impede bilingual education in Texas.

It is conceded by all concerned that there is a shortage of bilingual teachers in Texas and elsewhere. There are many reasons for the shortage. In fact, there are critical and chronic shortages not

only in bilingual teachers but in science and mathematics teachers, and for that matter in teachers generally in some areas. These events coincide with a decision ordering Texas to quadruple the number of grades in which bilingual education is provided -- a decree, by one of the same district judges involved here, that has been estimated to require an additional 20,000 nonexistent bilingual teachers. United States v. Texas, 506 F.Supp. 405 (E.D. Tex. 1981).

Illegal entrant children, as the record shows, cost nearly half again as much as the average Texas pupil to educate, but that is not the extent of the difficulty. Making present resources stretch farther can only mean that more bilingual teachers will perceive the task demanded of them as unreasonable.

D. Texas' fiscal restraint and sound budget should not be a basis for interpreting the

Constitution to impose duties upon the State that would otherwise not be imposed.

The lower courts found that the school districts of Texas, and the State, have sufficient moneys available to solve these problems in some unspecified manner. However, every State in the Union can supply funds in response to a court order by not using them on some other government function. There is no evidence, furthermore, that these are problems that can be solved by throwing dollars at them.

There is particularly great danger in the Alien Children District Court's reasoning that because Texas has a fiscally sound budget, and "can come up with the money," its surplus should go to this cause. Certainly, a constitutionally protected right would not be (and should not be) denied because the money is not in the treasury. For instance, a State would not succeed in claiming that it did not

have the money to provide counsel for indigents in criminal cases.

But even that is not the point. All government services cost money. There is today, for example, litigation concerning whether Texas should undertake enormous additional expenditures for its prison system. Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980) (Justice, J.), stayed in part, ____ F.2d ____ (5th Cir. 1981). Plaintiffs in that litigation have the ability to point to the same fiscally sound budget. Which cause should receive the money? If both District Courts reason by referring to the same surplus funds, should Texas interplead the funds? If it did, could a district court allocate funds to other severely needed services (for instance, mosquito control, police salaries or outpatient mental health care, all of which are seriously inadequate in Houston today)? These choices are not a judicial

function. The Alien Children District Court's reasoning, which penalizes Texas for sound finances and depends upon a surplus that is a small part of a large budget and produced artificially by accounting methods, should be rejected.

III. THE LOWER COURTS ERRED IN HOLDING THE EQUAL PROTECTION CLAUSE APPLICABLE TO ILLEGAL ENTRANTS.

A. The word "jurisdiction" in the equal protection clause means reciprocal obligation and authority. A construction that reduced it to a "physical territoriality" concept would lead to absurd results.

The fourteenth amendment extends the right of equal protection by a State to every person "within its jurisdiction." A strict "physical presence" or "territoriality" approach to this language would lead to the anomalous conclusion that a citizen temporarily residing in a foreign jurisdiction could not claim equal protection. Payments made under social programs could be arbitrarily stopped and he could

be denied the right to vote. This nonsensical result could be avoided by recognizing that the difference between a foreign-residing United States citizen and a foreign national with no right to enter the country is not that of physical presence or absence, but rather that of a lawful relationship to the United States creating mutual obligations.

There are judicially recognized instances in which persons within the territory of the United States are not granted the status of persons lawfully present. For example, such rights are not extended to an alien who is paroled into the United States pursuant to 8 U.S.C. § 212(d)(5) (1964) pending a deportation hearing (a process roughly similar to bail in criminal cases). Thus in Leng May Ma v. Barber, 357 U.S. 185 (1957), the petitioner had been detained for alleged illegal entry and was paroled. After she

was determined to have entered the country illegally, the petitioner claimed the immigration status of a person "within the United States." The Supreme Court rejected the contention, holding squarely that mere "physical presence" did not mean that an alien was "within the United States" in the meaning of immigration law. See also, e.g., Kaplan v. Tod, 267 U.S. 228 (1925) (paroled alien was not "dwelling in the United States" for purposes of naturalization and had not "entered," nor was she "found within," the United States for statute-of-limitations purposes). It is contradictory to hold that aliens released into the United States temporarily but lawfully are not "within the United States," but that the undocumented aliens in this case, who are not lawfully entitled to remain even temporarily, are "within the jurisdiction."

But this contradiction is only the

beginning of the results that would follow. Every right that has been held to heightened scrutiny would be granted to illegal entrants absent compelling contrary interests. Thus the plaintiffs would become entitled to maternity leave, Cleveland Board of Education v. La Fleur, 414 U.S. 632, 640 (1974); to unemployment compensation, Turner v. Department of Employment Security of Utah, 423 U.S 44, 46 (1975); to keep and bear arms, see, L. Tribe, American Constitutional Law 570 (1978); to the right of privacy granted by the penumbra discerned in Griswold v. Connecticut, 381 U.S 479, 519, (1965); to employment, Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976); to enter the public lands, Twining v. New Jersey, 211 U.S. 78, 97 (1908); to the arguable right to an affordable higher education, Vlandis v. Kline, supra, 412 U.S. at 459 (White, J., concurring); to the arguable right to food

stamps, United States Department of Agriculture v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring); and to a variety of other rights. Although not entitled to a green card, plaintiffs would be entitled to a driver's license, Bell v. Burson, 402 U.S. 535, 539 (1971). And there would be no constitutional means of preventing illegal entrants from traveling freely in interstate commerce, Edwards v. California, 314 U.S. 160 (1941). In fact, an extension of equal protection would mean that not just fundamental rights, but all rights, would be required to be extended as well -- absent rational basis to the contrary.

For these reasons, it is submitted that the phrase "within its jurisdiction" should not be construed to mean "physically within its territory." "Jurisdiction" means something more intangible in a legal context than physical location. It means

authority and correlative obligation. It is submitted that to look to the phrase "within its jurisdiction" as meaning "with respect to whom it has obligation and authority founded on legal relationship" is more in line with usage in law* and with a sensible interpretation of the sweep of the equal protection clause.

B. Due Process decisions are made under a different standard of application from equal protection. Thus undocumented aliens are not without rights; they have the more flexible rights of the due process clause.

The construction urged here would not mean that unlawful aliens would be without rights. They would have the protection of the due process clause, which is worded so as to cover "any person." That clause prohibits invidious discrimination as well as unfair procedure, but its sweep is more flexible than that of the equal protection clause. Mathews v. Diaz, 426 U.S. 67 (1976) (under due process clause, federal

government may condition benefits to aliens on close ties with the United States, as evidenced by five year's residence).

The due process clause ensures procedural fairness, primarily. For example, due process applies to the determination whether a suspected undocumented alien is, or is not, unlawfully present. Equal protection, however, serves an allocative function, rather than a procedural one. It guides government decisions dividing resources and other entitlements among people. The difference in function of the two clauses justifies, and indeed requires, a difference in treatment.

IV. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE STRICT SCRUTINY OF THE TEXAS STATUTE AT ISSUE AND DOES NOT INVALIDATE THE STATUTE.

Amicus curiae placed the argument concerning compelling interests supporting the statute first in this brief so that

arguments concerning reasons for the statute could be clear. It is submitted that, if the equal protection clause is applicable, normal analysis rather than heightened scrutiny is the appropriate standard, and that the purposes of the statute are rational.

A. Access to free education for undocumented aliens is not a fundamental right.

The District Courts acknowledged that San Antonio Independent School District v. Rodriguez, supra, bars a holding that education is a fundamental right. The District Courts, however, distinguished "access" to education and held that the question whether such access was a fundamental right was "reserved" in Rodriguez. The reasoning of Rodriguez is contrary to the District Courts' holding. The Alien Children District Court, for example, adopted the following definition of a fundamental right: "a right is fundamental

when it is preservative of or substantially related to other basic civil and political rights which are guaranteed by the Constitution." Aliens, supra, 501 F.Supp. at 558. The District Court cited Harper v. Virginia Board of Elections, 383 U.S.663 (1966), in support of this formulation. However, the Harper formulation was rejected in Rodriguez, and fundamental rights were limited to those actually guaranteed by the Constitution.

The language of the Rodriguez majority makes the point thus:

> "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing the equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. . . . [or] the right to travel. Rather, the answer lies in assessing whether the right to education is explicitly or implicitly guaranteed by the Constitution."

411 U.S. at 34 (emphasis added). The

Court went on to say, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected". 411 U.S. at 35.

Furthermore, the District Courts' holding is contrary to other Supreme Court authority following Rodriguez. In Ambach v. Norwick, 441 U.S. 68 (1979), the Supreme Court stated that after Rodriguez, "access to education is not guaranteed by the Constitution." 99 S.Ct. at 1594-95 and n.7 (emphasis added). This square statement that access to education is no more a fundamental right than equality of education forecloses the District Courts' holding.

Even if the District Courts are considered correct in having viewed the issue as one of first impression, it is submitted that access to education should

not be held a fundamental right. The District Court reasoned that such access was a fundamental right because of its potential for harm if denied and its necessity for the exercise of first amendment rights. But the right of access to medical care, nutrition, subsistence and housing are, by this standard, even more clearly "fundamental." The significance of this line of argument, indeed, was accepted by the Rodriguez court:

> "Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of Dandridge v. Williams, supra and Lindsey v. Normet, supra.

411 U.S. at 37. This reasoning applies with greater force when "access" to educa-

tion is the issue than when "equality" of education is the issue, because a person can exercise first amendment rights without education, but he cannot do so at all without subsistence.

The District Courts' reasoning is subject to the further difficulty that the right to vote is denied to aliens (an issue not raised by Rodriguez). Consequently, this right is irrelevant to the case. As to the right to "participate in the political process," even nonresident aliens present in the United States on a temporary sojourn have that right. For that matter, they have the right when they remain in their home nations. If education is a fundamental right of all those who have a right to participate in the political process in the United States, the class of people so entitled includes the entire world.

B. The District Courts erred in holding that Section 21.031 discriminates on the basis of wealth.

The District Courts cited the following footnote from Rodriguez in holding that Section 21.031 creates unconstitutional wealth discrimination.

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people . . . That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. 411 U.S. at 25, n. 60.

The District Court in the Alien Children case then concluded, "That set of circumstances is created by this case." Aliens, supra, 501 F.Supp. at 570.

Contrary to the District Courts' holding, it is respectfully submitted that the "set of circumstances" hypothesized by Rodriguez is not created by this case. The State has not made education available "only to those able to pay a tuition."

Nor has it "clearly defined a class of poor people." Instead, it makes a free education available to all citizens and all "legally admitted" aliens (as defined by Texas Education Agency guidelines), regardless of wealth.

C. The District Courts erred in holding that the Texas statute amounted to unconstitutional discrimination against children for acts of their parents.

The District Courts held that Section 21.031 unconstitutionally "penalizes" children for acts committed by their parents. The District Courts observed that the plaintiffs "are, of course, legally culpable" and subject to deportation, but reasoned that they cannot be subjected to any additional "burdens or penalties" because of this legal culpability. Such reasoning is inconsistent with any meaningful notion of legal culpability.

Furthermore, Lalli v. Lalli, 439 U.S. 259 (1979), indicates that a statute that

impinges upon a child because of the acts of his or her parents is subject only to the normal equal protection test of rational relationship. Parents have (and should have) far more authority to affect the welfare of their children than the State, and since they do, it would be inappropriate to require the State to come forward with a compelling state interest to justify every difference in welfare of children traceable to their parents' conduct.

The District Courts cited such decisions as Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1967), in support of their decisions. Weber dealt with a law denying statutory death benefits to illegitimate children. The Court in Weber was clearly correct in holding that the legislature could not rationally have found that a person would be deterred from intercourse outside wedlock because of noninheritance

by a potential illegitimate child. Here, on the other hand, the legislature was well within the realm of reason in concluding that the substantial interests at issue would be advanced by the balance of competing social concerns at which it arrived.

There is a further reason why the line of cases represented by Weber is inapplicable here. In Weber, as in the predecessor cases of Levy v. Louisiana, 391 U.S. 68 (1967), and Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 1515 (1968), the Court "treated as determinative the inability of both parent and child to remove the burdens imposed by the illegitimacy." L. Tribe, American Constitutional Law 1057-58 (1978). Illegal presence is not an irremediable condition. Either the parents or the children can "remove the burden" in this case. The alien children have a right (which is not

shared by the children of Texas) to attend the schools of their nation under the laws of those nations. Furthermore, if they have the sort of relationship with Texas that ought to qualify them to attend school, they can conform to Texas Education Agency guidelines, which allow even technically illegal entrants to attend without charge.

CONCLUSION

The balance of competing social concerns at which Texas has arrived is not prohibited by the equal protection clause. This court should uphold that balance.

Respectfully submitted,

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APPENDIX "A"

.010 *Free Attendance in General.*

(a) (No change.)

(b) Administrative procedure.

(1)-(2) (No change.)

(3) For purposes of this section, the term "legally admitted alien" means any student who has, or whose parent, guardian, or other person having lawful control of him or her under an order of court, has any documentation issued by the United States government showing lawful entry into and admission to resident status in the United States as permitted by federal statutes and the regulations established pursuant thereto. Such documentation of resident status may include:

(A) Form I-151—Alien registration receipt card.

(B) Form I-151—Resident alien card.

(C) Form I-94—Arrival-departure record: Parole edition.

(D) Form I-94—Arrival-departure record.

(E) Passport stamped "Processed for I-551—Temporary evidence of lawful admission for permanent residence. Valid until_____ _____. Employment authorized."

(F) Form I-181b—Letter from regional INS director stating "Processed for I-551 temporary evidence of lawful admission for permanent residence. Valid until_____. Employment authorized."

(G) Letter from INS stating application for citizenship or application for residence is on file.

(H) Letter from consul general of the United States stating petition is on file.

(I) Form I-130—Petition to classify status of alien relative for issuance of immigrant visa.

(J) Form I-171—Notice of approval of relative immigrant visa petition.

(K) Form I-210—Voluntary departure (Silver-Level letter) marked "Under docket control."

(L) Form I-140—Employment verification (when proof shows that form ...as been filed with INS).

(M) Form I-230—Application for immigrant visa and alien registration (when stamped or signed by an American consul).

(N) Form FS-510—Form used by foreign service consulate in a foreign country. Filed after I-130 or I-140.

(O) Any other document recognized by the United States government.

(4) Upon application for enrollment at any local school district, a student shall present a copy of his or her permanent student academic record reflecting any prior education in a Texas public free school as required by policy and administrative procedure 23.06.030. In the event there has been no prior education or the student applicant has no permanent student academic record, the local district shall create a permanent student academic record for such student pending his or her acceptance for enrollment.

(5) In the event a child fails to produce documentation showing either a status of citizenship or that of a legally admitted alien, then the local school district shall immediately initiate an official inquiry to the regional office of the United States Immigration and Naturalization Service requesting documentation of the applicant's status. The status of such a student shall be identified in the permanent student academic record as "pending federal confirmation." The enumeration of students who are pending federal confirmation shall remain on file with the school district subject to audit by the Texas Education Agency.

(6) These procedures are applicable to those students for whom state minimum foundation support is requested and nothing herein shall prohibit any local district from accepting any student on a basis of tuition charges or cost paid by the local district.

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Doc. No. 801198 A. O. Bowen
Commissioner of Education

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For further information, please call (512) 475-7077.

CERTIFICATE OF SERVICE

I do hereby certify that true and correct copies of the foregoing Brief of Amicus Curiae, The Legal Foundation of America, has been served upon all parties by placing copies of same in the United States Mail, addressed to:

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